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IN THE

Supreme Court of the United States

October Term, 1949

No. 962

BOY COLE and LOUIS JONES, *Petitioners*

v.

STATE OF ARKANSAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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v.

STATE OF ARKANSAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Roy Cole and Louis Jones pray that a writ of certiorari issue to review a decision of the Supreme Court of Arkansas rendered January 10, 1949, affirming judgments of the Pulaski Circuit Court, First Division, finding petitioners guilty of violating Act 193, Arkansas Acts of 1943 (Popes Digest Stats. Ark., 1944 Cum. Supp. p. 691).

OPINION BELOW

The opinion of the Supreme Court of Arkansas appears in the Record at p. 115, and is reported at 216 S.W. 2d 402, and at 23 LRRM 2334. It has not yet been officially reported.

JURISDICTION

The decree of the Supreme Court of Arkansas was entered on January 10, 1949 (R. 114). On April 5, 1949, Mr. Justice Rutledge signed an order extending the time for filing a

petition for writ of certiorari to and including May 10, 1949 (R. 125). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2) and (3).

1. The Supreme Court of Arkansas affirmed judgments finding petitioners guilty of violating Act 193, Arkansas Acts of 1943, upon the basis of an interpretation of the statute different from that upon which the case was tried. Petitioners contend that the Arkansas supreme court thereby violated the due process clause of the Fourteenth Amendment, and disregarded or misinterpreted the opinion and mandate of this Court in this case at the last Term, *Cole* v. *Arkansas*, 333 U.S. 196. This claim was specially set up under the Constitution of the United States and under an authority exercised under the United States. The decision below in this regard is therefore reviewable by writ of certiorari under 28 U.S.C. 1257(3).

2. Petitioners contend that the information upon which they were tried was so vague and indefinite that it did not fairly inform them of the charges against them, in violation of the due process clause of the Fourteenth Amendment. This claim was specially set up under the Constitution of the United States. The decision below in this regard is therefore reviewable by writ of certiorari under 28 U.S.C. 1257(3).

3. Petitioners were convicted of violating Section 2 of Act 193 of the 1943 Arkansas Legislature. As stated by this Court upon the prior review (333 U.S. at 202), petitioners in the state supreme court had "raised serious objections to the validity of that section under the Fourteenth Amendment to the Federal Constitution." Among these objections, as listed by the Court in a footnote, were:

> "(1) that petitioners were deprived of freedom of speech and assembly by reason of their convictions under §2;
>
> (2) that their convictions were based upon a statute • • • too vague and indefinite to conform to due process • • •"

These objections were again renewed by petitioners upon the latest review of the case before the Arkansas supreme court.

There was thus drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution, and the decision below was in favor of its validity. The decision below is therefore reviewable here by appeal under 28 U.S.C. 1257(2), or by certiorari under 28 U.S.C. 1257(3).

The jurisdiction of the Court more fully appears from the Statement and the Reasons for Granting the Writ.

QUESTIONS PRESENTED

1. Whether the state supreme court deprived petitioners of due process of law, and failed to give effect to the decision and mandate of this Court in this case at the last Term, by again affirming petitioners' convictions upon the basis of a construction of the state statute different from that upon which petitioners were charged and tried.

2. Whether petitioners were deprived of freedom of speech and assembly, in violation of the due process clause, by reason of their convictions under an Arkansas statute which makes criminal presence on a picket line where violence occurs.

3. Whether petitioners were deprived of due process of law because their convictions were based upon a charge and a statute too vague and indefinite to conform to due process.

STATUTE INVOLVED

Act 193, Acts of Arkansas 1943.
(Popes Digest Stats. Ark., 1944 Cum. Supp. p. 691)

Section 1. It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or attempt to prevent any person from engaging in any lawful vocation within this State. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years.

Section 2. It shall be unlawful for any person acting in concert with one or more other persons, to assemble at or near any place where a "labor dispute" exists and by force or violence prevent or attempt to prevent any person from

engaging in any lawful vocation, or for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years.

Section 3. The term "labor dispute" as used in this Act shall include any controversy between an employer and two (2) or more of his employees concerning the terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment.

Section 4. The provisions of this Act shall be cumulative of all other existing articles of the Penal Code upon the same subject, and in the event of a conflict between existing articles and the provisions of this Act, then and in that event the provisions, offenses and punishments set forth herein shall prevail over such existing articles.

Section 5. If any section, paragraph, clause, or provision of this Act is declared unconstitutional, inoperative or invalid by any court of competent jurisdiction, the same shall not affect or invalidate the remainder of this Act.

STATEMENT

Cole and Jones, the petitioners, together with Jessie Bean, were originally indicted by an Arkansas Grand Jury for using "force and violence" to "prevent Otha Williams from engaging in work as a laborer at the Southern Cotton Oil Company" (R. 3). The indictment thus alleged a violation of Section 1 of Act 193 of the 1943 Arkansas Acts. The three defendants were convicted, but on appeal the Supreme Court of Arkansas reversed on a question of admissibility of evidence, and remanded for a new trial. *Cole et al.* v. *State*, 210 Ark. 433, 196 S.W. 2d 582.

Following the reversal, the Prosecuting Attorney filed the felony information involved in this proceeding. This information reads in full as follows (R. 1):

> Comes Sam Robinson, Prosecuting Attorney within and for Pulaski County, Arkansas, and in the name, by the authority, and on behalf of the State of Arkansas information gives accusing Roy Cole, Louis Jones and Jessie Bean of the crime of felony, committed as follows to-wit: On the 26th day of December, A. D. 1945, in Pulaski County, Arkansas, Walter Ted Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a labor dispute existed, and by force and violence prevented Otha Williams from engaging in a lawful vocation. The said Roy Cole, Louis Jones and Jessie Bean, in the County and State aforesaid, on the 26th day of December, 1945, did unlawfully and feloniously, acting in concert with each other, promote, encourage and aid such unlawful assemblage, against the peace and dignity of the State of Arkansas.

The information thus charged Cole, Jones and Bean with violating the second part of Section 2 of the Act, that concerning aiding an unlawful assemblage. It did not repeat the charge of the indictment that they by force and violence prevented Otha Williams from working; on the contrary, this conduct was attributed to Walter Ted Campbell, not a defendant.

At the trial, the following facts appeared:

Petitioners are two Negroes,[1] who were employed by the Southern Cotton Oil Company in North Little Rock, Arkansas. On December 17, 1945, about 112 of the plant's workers, including petitioners, went out on strike for higher wages and shorter hours; five workers remained in the plant (R. 14-16, 70, 71, 85). On December 26, 1945, the five non-striking workers left the plant in a group at the close of work. Near the plant and across a railroad track was a group of about four of the strikers. The testimony differs as to their identity and number, but some of the state's testimony placed Cole and Jones in the group. One of the strikers, identified by the state's witnesses over his denial as Louis Jones, called to Otha Williams, one of the non-strikers, and asked him to wait.

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[1] The record designated negro witnesses by the symbol "(CM)." See R. 70 (Jones), 77 (Cole). The same symbol is used in the information (R. 1).

Williams refused. Walter Ted Campbell, a striker, then attacked Williams. The two men fought, and Williams used a pocket knife and killed Campbell (R. 19-22, 24, 25, 28, 29, 34-36, 42-45, 76). The record is clear that no one other than Campbell attacked, fought or hit Williams (R. 37, 38, 45, 54, 55), nor does the record show any violence or physical conflict other than that between Williams and Campbell.*

At the conclusion of the trial, the court, after reading Section 2 of Act 193 to the jury, gave the following instruction (R. 94):

> You are instructed that this section of the Act includes two offenses, first, the concert of action between two or more persons resulting in the prevention of a person by means of force and violence from engaging in a lawful vocation. And, second, in promoting, encouraging or aiding of such unlawful assemblage by concert of action among the defendants as is charged in the information here. The latter offense is the one on trial in this case.

The court also gave the following instruction (R. 95):

> If you believe from the evidence in this case beyond a reasonable doubt that on or about the 26th day of December, 1945, Walter Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a "labor dispute" existed and by force and violence prevented Otha Williams from engaging in a lawful vocation; and if you further believe beyond a reasonable doubt that the defendants wilfully, unlawfully and feloniously, which [sic] acting in concert with each other, promoted, encouraged and aided such unlawful assemblage, you will convict the defendants as charged in the indictment.

All three defendants were again convicted, and were each sentenced to serve a year in the state penitentiary (R. 25, 26,

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* Willie Brown, one of the five workers, testified that after Williams refused to stop, Louis Jones gave a signal and said "Come on, boys," after which "they flew up like blackbirds and came fighting" (R. 21). However, no testimony is in the record of any blow struck other than in the Campbell-Williams fight, and Brown left the scene unmolested and on Cole's suggestion, after seeing Campbell strike Williams (R. 21, 22, 79). Willie Johnson and Elvie Washington, two of the five workers, ran away (R. 31, 32, 36); and the movements of the fifth worker (Lawrence Cross), who did not testify, are not in the record.

27). Petitioners and Bean again appealed, on the ground, among others, that Section 2, if construed to sustain the conviction, was unconstitutional.

On appeal, the Supreme Court of Arkansas, with one Justice dissenting, affirmed the convictions of petitioners Cole and Jones (R. 104). The conviction of Bean was reversed (two Justices dissenting) with directions that the case be dismissed as to him, on the ground that the evidence was not sufficient to sustain his conviction (R. 104-105).

In its opinion the Supreme Court of Arkansas asserted that the information accused petitioners of using force and violence to prevent Williams from working; that such conduct was made unlawful by Section 1; that it was therefore unnecessary to consider the questions which were raised as to the constitutionality of Section 2; and that there was evidence to sustain the convictions (R. 106-107). One Justice dissented on the latter point (R. 108).

A petition for rehearing was filed, which pointed out that the convictions had been affirmed under an entirely different section of the statute than that which petitioners had been charged with, and tried for, violating (R. 108-109). The petition also urged that this variance deprived petitioners of due process (*Id.*). The petition for rehearing was promptly denied (R. 109.)

This Court granted certiorari (332 U.S. 834), and unanimously reversed the convictions. This Court pointed out (333 U.S. at 200 and 201) that the trial judge had:

> charged the jury that petitioners were on trial for the offense of promoting an unlawful assemblage, not for the offense "of using force and violence"

but that the state supreme court had affirmed the convictions of petitioners "as though they had been tried for violating § 1, an offense for which they were neither tried nor convicted."

This Court declared (333 U.S. at 202):

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

On remand, the Supreme Court of Arkansas, on October 25, 1948, handed down an opinion again affirming the convictions of petitioners. This opinion has since been withdrawn by the court, and is not included in the transcript of record certified by its clerk, but is unofficially reported at 23 LRRM 2022. In this opinion the Arkansas supreme court stated (23 LRRM 2024):

> Insofar as it involves the case herein before us, Sec. 2 of the Act requires as essential to a conviction a finding of concurrent facts as follows:
>
> (1) The defendants "acting in concert with one or more persons";
>
> (2) Did assemble at or near a place;
>
> (3) Where a labor dispute exists; and
>
> (4) By force or violence did prevent or attempt to prevent Otha Williams from engaging in any lawful vocation.
>
> The remaining portion of Sec. 2 of the Act relates to a situation not involved in this case, and will be later discussed. The four essentials above are the only ones that we need consider in weighing the facts here.

The court then went on to review the evidence on each of these four points and concluded (23 LRRM 2025):

> There is sufficient evidence to support the verdict of the jury that the defendants "by force or violence prevented or attempted to prevent" Otha Williams "from engaging in any lawful vocation" at the time and place where these defendants, acting in concert, were assembled near a place where a labor dispute existed.

The Supreme Court of Arkansas then repeated (23 LRRM 2025):

> Now, as previously stated, there is other language in Sec. 2 which reads: "* * * or for any person acting either by himself, or as a member of any group or organizations or acting in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage * * *."
>
> We express no opinion on the validity or effect of this language until a case involving it is duly presented to us. This last quoted language relates to an offense entirely different from the case here at bar.

The court then went on to sustain the constitutionality of the first part of Section 2 of the Act.

A petition for rehearing was once more filed. It pointed out that the Arkansas supreme court, in violation of due process and in disregard of the opinion of this Court, had again reviewed the conviction as if it were for using force and violence, although petitioners had been tried only for aiding an unlawful assemblage. This time the court had reviewed the conviction under the first part of Section 2, instead of under Section 1, but while both of those provisions deal with the use of force and violence to prevent another from working, the latter part of Section 2 deals with aiding an unlawful assemblage, and it was only on the latter charge that petitioners had been tried.

Following the filing of this petition the Arkansas supreme court withdrew its opinion, and on January 10, 1949, it handed down its fourth opinion.* It is this opinion and judgment which petitioners now ask this Court to review.

In this opinion of January 10, 1949 the Arkansas supreme court affirms the convictions for the third time, and advances its third version as to the nature of petitioners' offense. This time the court, for the first time, purports to review the conviction under the latter part of Section 2, which makes it unlawful "for any person * * * to promote, encourage or aid in such unlawful assemblage." "Such unlawful assemblage" the opinion declares, refers to an assemblage of the type denounced in the first part of Section 2, that is "one where persons acting in concert have assembled in an attempt to prevent by force or violence some other person from engaging in a lawful occupation." (R. 119). The opinion then goes on to declare that the statute in question "is aimed at the same generic offense" as an earlier statute making it a crime to "assemble together with the intent" to riot (R. 102-121), and that the present statute is constitutional (R. 122). The opinion then reviews the evidence and concludes that the "defendants participated, aided, encouraged and abetted in an agreement with others to the effect that the workers * * *

*The statement in the second sentence of the opinion "that this is the third opinion of this court" ignores the withdrawn opinion of October 25, 1948, which the court had likewise labeled as its third.

would be whipped if they did not agree to quit work" (R. 122-124). Summing up, the opinion concludes that the assemblage was unlawful "because of its purpose and its accomplished results" (R. 124).

Thus the Arkansas supreme court in its latest opinion apparently interprets the second part of Section 2 as applying only to those who "aid" the "assemblage"—that is, participate in picketing—with the purpose or intention that force and violence be used to prevent others from working.

REASONS FOR GRANTING THE WRIT

1. The Supreme Court of Arkansas failed to give proper effect to the decision and mandate of this Court in this case at the last Term. In *Cole* v. *Arkansas*, 333 U.S. 196, this Court reversed a prior judgment of the Arkansas supreme court because of variance between the interpretation of the statute upon which the case had been tried and the construction given the statute by the state supreme court in affirming the convictions. The latest decision of the Supreme Court of Arkansas is subject to the same infirmity.

The information by which petitioners were charged (set out *supra* p. 5) and the trial court's instructions to the jury (set out *supra* p. 6) clearly required nothing more for conviction than that the defendants were present on a picket line where violence did in fact occur. Neither the information nor the instructions included as an element of the offense the requirement that the defendants shall have participated in the picket line with the "purpose" that force and violence be used.

In contrast, the latest opinion of the Arkansas supreme court, as detailed *supra* pp. 9-10, apparently reads into the statute the requirement that the accused must have intended, or had the purpose, that force and violence would be used on the picket line. This element of "purpose," or advance "agreement" to use force and violence was no part of the offense charged in the information or defined by the judge to the jury. It was read into the statute for the first time in the last opinion of the Arkansas supreme court, just as in two earlier opinions it had read in a requirement of actual participation

in force and violence by the defendants.[4] In thus affirming the convictions, and sustaining the constitutionality of the statute, upon the basis of a construction of the the statute different from that upon which the case had been tried and submitted to the jury, the state supreme court again violated the due process clause of the Fourteenth Amendment, and failed to give effect to the opinion of this Court.

2. As this Court stated in its opinion on the prior appeal (333 U.S. at 201) petitioners, in the state supreme court, had

> also raised serious objections to the validity of that section under the Fourteenth Amendment to the Federal Constitution

including the contention—

> that petitioners were deprived of freedom of speech and assembly by reason of their convictions under § 2.

This issue is again presented and given even sharper focus by the latest decision of the Arkansas supreme court.

Literally read, the statutory provision under which petitioners were tried and convicted makes it a felony for any person to "promote, encourage or aid" any assemblage at or near any place where a labor dispute exists. So read, the statute clearly violates rights of free speech and assembly which the due process clause of the Fourteenth Amendment protects from infringement by the states. *Carlson* v. *California*, 310 U.S. 106; *Thornhill* v. *Alabama*, 310 U.S. 88; *AFL* v. *Swing*, 312 U.S. 321. Those cases establish that striking laborers have a constitutional right to assemble peaceably near the plant which is struck and to express their views on the matter in controversy.

If the statute is construed, as it was by the trial court and as it can be with a small sacrifice of literalness, as making the encouragement of such assemblage felonious only if some member of the assembly (who need not be the person tried) engages in violence or threats to prevent persons from work-

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[4] In its last opinion the state supreme court continues to insist that the defendants "actually participated in the acts of violence" although it concedes that they "are now only charged with aiding and encouraging the unlawful assemblage."

ing, it still violates constitutional rights as established by the cited cases. Unlike the statute before this Court in *Giboney* v. *Empire Storage and Ice Company*, 69 Sup. Ct. 684, the Arkansas statute, so construed, does not make picketing for particular purposes unlawful. Rather, if violence occurs, picketing becomes retroactively a felony. Such a statute, furthermore, violates due process by departing from the principle that guilt is personal and is not to be imputed to one person for another's misconduct. *Kotteakos* v. *U.S.*, 328 U.S. 750, 773; *De Jonge* v. *Oregon*, 299 U.S. 353; *Bridges* v. *Wixon*, 326 U.S. 135; *Schneiderman* v. *U.S.*, 320 U.S. 118, 136.

As stated, it is our understanding that the latest decision of the Arkansas supreme court, in an evident attempt to save the constitutionality of the statute, interprets it as applying only to the aiding of an assembly formed for the purpose of engaging in violence. But such a construction cannot save the statute, for two reasons.

In the first place, no such limited construction was given the jury. It could have found guilt under the court's instructions merely by finding that the defendants were present on a picket line where violence did in fact occur. A statute which is invalid if taken at face value cannot be saved by a construction not submitted to the jury.

In the second place, a statute which regulates speech and assembly is judged not only by the construction which the courts may ultimately give it, but by the inhibiting effect its general words may have upon the exercise of constitutionally protected rights of speech and assembly. *Thomas* v. *Collins*, 323 U.S. 516. In practical effect, the statute under which petitioners were convicted constitutes a device to evade, through obscurity of language and application, the constitutional protections accorded the rights to picket by such cases as *Thornhill* v. *Alabama*, *supra* and *AFL* v. *Swing*, *supra*. According to the trial court mere presence on a picket line where violence in fact occurs is a felony. According to the state supreme court those present on a picket line may be convicted of a felony if violence occurs and the court thereafter concludes that the picket line was assembled for the purpose of using violence. Under either construction a worker engaging in

Arkansas in his constitutional right to picket is under such hazard and such danger of committing a felony that his constitutional right is rendered meaningless.

This statutory provision and its application in this case have hindered efforts of the Congress of Industrial Organizations to organize employees in Arkansas. The assembling of striking workers is handicapped by their warranted fear that their mere assembling, no matter how peaceful their intentions and conduct, may subject any one of them to a felony conviction. The same situation exists in Texas, whose statute was copied by Arkansas. Art. 1621b, Texas Penal Code, as amended by c. 100, Acts 1951; Vernon's Ann. Penal Code, art. 1621b. It is possible that other states will imitate these statutes in view of their effectiveness in hampering organized labor. It is therefore of great importance to the labor movement that the constitutionality of this statute be reviewed by this court.

3. That the convictions were based upon a charge and a statute too vague and indefinite to conform to due process could, by this time, hardly be more manifest. The information under which petitioners were tried has in successive opinions of the Arkansas supreme court been held to charge a crime under Section 1 of the statute; then under the first part of Section 2; and finally under the latter part of Section 2. An information which so utterly confuses the state supreme court as to what crime it charges can hardly be said fairly to have informed the accused to the nature of the charges against them. For while the Arkansas supreme court has never doubted that these two colored boys were guilty, it has never been sure of what.

The statute itself likewise fails to meet the constitutional tests of definiteness. The portion of Section 2 involved in the present case makes it a crime to permit, encourage or aid "any such unlawful assemblage." The term "unlawful assemblage" is nowhere defined, though undoubtedly it was meant to refer in some fashion to the first portion of Section 2. That part of Section 2 does not deal with assemblages, however, but makes it a crime to assemble at a place where a labor dispute exists and by force or violence prevent a person from working. The trial court never specifically de-

fined "unlawful assemblage" to the jury but told it, in effect, that an assemblage which resulted in the use of force and violence to prevent a person from working was unlawful. The state supreme court added the requirement that the picket line must have assembled for the purpose of using violence. Perhaps the construction given the statute by the trial court might have been fairly anticipated "in advance of judicial utterance" (*Lanzetta* v. *New Jersey*, 306 U.S. 451, 456), but certainly the construction of the appellate court could not. And the standards of definiteness which criminal statutes must meet under the due process clause are particularly stringent in the case of statutes which, like the present, are restrictive of free speech and assembly. *Winters* v. *New York*, 333 U.S. 507, 509-510; *Thomas* v. *Collins*, *supra*.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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